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IN THE

Supreme Court of the United States

72-676

OCTOBER TERM, 1972

STEVEN LYLE CRAIG,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF COLORADO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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No. _____

IN THE
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STEVEN LYLE CRAIG,
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THE PEOPLE OF THE
STATE OF COLORADO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

Steven Lyle Craig, your Petitioner, prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of the State of Colorado, entered in the above-entitled case, on July 3, 1972, affirming the Petitioner's conviction of First-Degree Murder and Conspiracy to Commit First-Degree Murder in violation of C.R.S. 40-2-3 (1963) and C.R.S. 40-7-35 (1963).

OPINION BELOW

The Opinion of the Supreme Court of the State of Colorado was entered on July 3, 1972 (Appendix A, infra).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

DATE OF JUDGMENT AND TIME OF ENTRY

The Judgment of the Supreme Court of the State of Colorado was entered on July 3, 1972.

DATE OF ORDER GRANTING AN EXTENSION OF TIME TO FILE THE PETITION FOR WRIT OF CERTIORARI

An extension of time to file the Petition for Writ of Certiorari was granted by this Court on October 2, 1972, extending the time to and including October 31, 1972.

QUESTIONS PRESENTED FOR REVIEW

I. Was Petitioner's right to a trial by a fair and impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution violated by permitting the prosecutor to challenge for cause prospective jurors with scruples against the death penalty?

II. Was Petitioner's right to a trial by a fair and impartial jury violated by the selection

of the array of jurors solely from the list of registered voters in the county?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment to the Constitution of the United States:

AMENDMENT VI - In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Eighth Amendment to the Constitution of the United States:

AMENDMENT VIII - Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment to the Constitution of the United States:

AMENDMENT XIV, Section 1 - All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

C.R.S. 40-2-3(1) (1963) (Appendix B, infra)

CONCISE STATEMENT OF THE CASE

On October 6, 1969, Steven Lyle Craig, hereafter referred to as the Petitioner, was charged along with several other individuals with the crimes of First Degree Murder, C.R.S. 40-2-3(1963) and Conspiracy to Commit to Murder C.R.S. 40-7-35 (1963). (ff. 3-5) The Petitioner entered a plea of not guilty to the charges and stood trial before the Honorable G. Russell Miller in the State District Court of Colorado Springs, Colorado on May 11, 12, 13, 14, 15, 16 and 18, 1970 (ff. 34, 215)

The Petitioner was tried by a jury of twelve (12) jurors selected from a jury panel compiled by the Jury Commissioner solely from the voter registration lists of El Paso County, Colorado. (ff. 227-238) Prior to the jury selection, the Petitioner objected to the composition of the jury panel from which the jury was to be chosen. (ff. 273-278) Petitioner contended that he was denied due process of law in the selection of a jury drawn exclusively from the list of registered voters in the county. The trial court overruled Petitioner's objection and the trial commenced.

The Petitioner objected during the voir dire to the seventeen (17) challenges for cause granted to the prosecution by the trial court.

The seventeen challenges for cause pertained to prospective jurors who stated they held scruples against imposing the death penalty. (ff. 273-278, 282-283, 284-286, 764-773, 814-818, 818-824, 824-829, 918-924, 1052-1059, 1138-1145, 1226-1234, 1327-1335, 1366-1373, 1536-1543, 1604-1629, 1711-1719, 1750-1754.) The Petitioner exhausted his allowed peremptory challenges. (f. 1748).

The Petitioner was convicted on May 18, 1970 and sentenced by the jury to life imprisonment on the charge of First-Degree Murder. (ff. 3208). The jury also found the Petitioner guilty of Conspiracy to Commit Murder and on June 30, 1970 the trial judge imposed the life sentence on the Petitioner and, in addition, the trial court sentenced Petitioner to not less than seven years nor more than ten years in the Colorado State Penitentiary on the Conspiracy count. (ff. 166-167, 193-194, 196-200)

On July 7, 1970, a notice of appeal was filed (ff. 202-203). On July 3, 1972 the Colorado Supreme Court affirmed the Petitioner's conviction of both First-Degree Murder and Conspiracy to Commit Murder, (Appendix A, infra).

ARGUMENT

I.

PETITIONER'S RIGHT TO A TRIAL BY A FAIR AND IMPARTIAL JURY UNDER THE SIXTH AND FOURTEENTH AMENDMENTS WAS VIOLATED BY PERMITTING THE JURY TO BE DEATH QUALIFIED.

A. NEW DATA ESTABLISHES THAT A DEATH QUALIFIED JURY IS CONVICTION PRONE.

In Witherspoon v. United States, 391 U.S. 510 (1968), the Court held that the penalty of death imposed by a jury in which all those having scruples against the death penalty were excluded was invalid because it was a sentence imposed by an unfair, partial, "hanging jury". The Court refused, however, to hold that a death qualified jury was conviction prone, expressly holding open that question. It is submitted that the question should now be decided in the instant case. Studies by social scientists since the date of the Witherspoon decision have unearthed significant new data.

First, there is the study by Edgar J. Bronson entitled On the Conviction Proneness and Representativeness of a Death Qualified Jury: An Empirical Study of Colorado Veniremen, 42 Colorado Law Review 1 (May, 1970). In the Bronson study a large number of jurors were polled on their attitudes regarding both the death penalty and their tendency to convict a person of a crime. Bronson concluded that there was a statistically significant correlation between conviction proneness and lack of scruples against the death penalty.

Even more significant is an article by George L. Jurou, New Data on the Effect of a Death Qualified Jury on the Guilt Determination Process, 84 Harvard Law Review 567, (January, 1971). The Jurou article contains a comprehensive discussion of the previous studies and articles and contains a careful study performed by Jurou under a grant from the United States Department of Justice. Like

the Bronson study, the Jurou study finds a significant, statistical correlation between lack of scruples against imposing the death penalty and conviction proneness.

When the Court in Witherspoon refused to hold that a death qualified jury was conviction prone, death was a penalty that could be imposed in most of the jurisdictions in the United States. Now, in light of Furman v. Georgia, 40 LW 4923, (June 29, 1972, Case No. 69-5003), there is substantial doubt whether the imposition of the death penalty is constitutional. See also People v. Anderson, 6 Cal. 3rd 628, 493 P.2d 880 (1972). Thus, there is apparently no constitutionally permissible state interest in permitting challenges for cause based upon opposition to the death penalty. The numerous studies indicating a correlation between conviction proneness and the unscrupled juror take on new significance.

Perhaps the Court's reluctance to rule on whether the unscrupled juror was conviction prone in Witherspoon was understandable in light of the fact that as of the date of that decision the death penalty was apparently a constitutionally permissible mode of punishment. Since the death penalty has apparently been ruled unconstitutional there is no reason to avoid making the obvious finding that the unscrupled juror is conviction prone to the detriment of the accused's right to a trial by a fair and impartial jury.

As Mr. Justice Douglas stated in his concurring opinion in Witherspoon, "[W]e do not require a showing of specific prejudice when a defendant has been deprived of his right to a jury representing a cross-section of the

community." 391 U.S. at p. 531. In the instant case 24% of the panel or seventeen (17) jurors were successfully challenged by the district attorney because of scruples they held against the death penalty. However, the studies establishing a correlation between conviction proneness and lack of scruples against the death penalty amount to a showing of specific prejudice.

In light of this Court's condemnation of the death penalty there is now no reason to avoid making the finding that individuals who lack scruples against imposing the death penalty are conviction prone. Mr. Justice Douglas in his concurring opinion in Witherspoon comments on the difficulty of showing concrete proof of prejudice. This difficulty has been recognized in employment discrimination cases where a showing of statistical trends was held by this Court sufficient proof to establish a prima facie case of employment discrimination. Griggs v. Duke Power, 401 U.S. 424 (1971). It is submitted that due to a large number of variables, a similar difficulty of showing clear and convincing proof is presented in establishing a correlation between conviction proneness and the unscrupled juror. Since there is now no legitimate interest in preserving the death penalty, this court should now accept the available proof showing a correlation between conviction proneness and the unscrupled juror.

B. SINCE THE DEATH PENALTY HAS BEEN RULED UNCONSTITUTIONAL, DEATH QUALIFICATION OF JURORS IS UNCONSTITUTIONAL AND DEPRIVES THE ACCUSED OF HIS RIGHT TO A TRIAL BY A FAIR AND IMPARTIAL JURY.

It is submitted that even if the new data cited to this Court concerning conviction proneness of unscrupled jurors is insufficient to persuade this Court, Petitioner's right to a trial by a fair and impartial jury in the instant case was abridged by qualification of the jury by the prosecution for the death penalty.

It is submitted that qualification of the jury was improper in light of the Court's decision in Furman v. Georgia, 40 LW 4923, (June 29, 1972, Case No. 69-5003). Any time people are arbitrarily excluded from juries by the state, the accused's right to a trial by a fair and impartial jury has been abridged, even absent a specific showing of prejudice. Norris v. Alabama, 294 U.S. 597 (1935) (jury exclusion of Negroes); Hernandez v. Texas, 347 U.S. 475 (1945) (exclusion on the basis of national origin); Thiel v. Southern Pacific Company, 328 U.S. 217 (1946) (exclusion of wage earners). Since 24% of the panel or seventeen jurors were successfully challenged for cause on an improper basis in the instant case, Petitioner's constitutional right to a trial by a fair and impartial jury representing a cross-section of the community was violated.

II.

PETITIONER'S RIGHT TO A TRIAL BY A FAIR AND IMPARTIAL JURY WAS VIOLATED BY THE SELECTION OF THE ARRAY OF JURORS SOLELY FROM THE LIST OF REGISTERED VOTERS IN THE COUNTY.

Petitioner has an absolute right to a trial by a fair and impartial jury representing a cross-section of the community. In compiling

the jury panel in this case solely from the list of registered voters in El Paso County the State of Colorado abridged this right. The requirements for voter registration in El Paso County were at the time of trial that the voter must be twenty-one (21) years of age or older, a resident in the precinct where registered for at least thirty-two (32) days, one year residence in the State of Colorado and must have either registered to vote or have voted in the last election. See C.R.S. 49-3-1(1) (1963). Thus, the method of jury selection in the instant case excluded the person who has recently moved within the State of Colorado, or has within one year moved to the State of Colorado, or the person who fails to register to vote or who has not voted in the last election. A long line of cases forbids exclusion of qualified groups from jury service. If the exclusion is wrongful, defendant does not even have to show prejudice. In Glasser v. United States, 315 U.S. 60, (1942), this Court roundly condemned the practice of drawing women jurors from the membership of the League of Women Voters.

> No matter how high-principled and imbued with a desire to inculcate public virtue such organization may be, the dangers inherent in such a method of selection are the more real when the members of those organizations from training or otherwise, acquire a bias in favor of the prosecution. The jury selected from the membership of such organization is then not only the organ of a special class, but in addition, it is openly partisan. If such practices are to be countenanced, the hard won right of trial

> by jury becomes a thing of doubtful value lacking one of the essential characteristics that have made it a cherished feature of our institutions. . . . 315 U.S. at 86.

Other examples of improper jury selection are condemned in the following cases: Smith v. Texas, 311 U.S. 128 (1940) (exclusion on basis of color); Ballard v. United States, 329 U.S. 187 (1946) (exclusion on basis of sex); Chesnut v. New York, 370 F.2d 1 (1st Cir. 1966) (exclusion on basis of color); Lobat v. Bennett, 365 F.2d 698, (1966) (exclusion on basis of economic status).

Although it is not necessary to show prejudice to the accused where there has been improper jury selection, there is little doubt that the Petitioner's right to a fair and impartial jury was prejudiced in the case before the Court. The record reveals that Petitioner had just moved to Colorado, however, he was tried by longtime Colorado residents and, in fact, only residents of the state for one year or more could qualify for the jury panel. Petitioner was not registered to vote due to his age, but he was tried by only registered voters.

It is submitted that the El Paso Jury Commissioner violated the Petitioner's constitutional right to a fair and impartial jury as guaranteed to him in the Sixth Amendment of the United States Constitution and as applied to the states through the Fourteenth Amendment of the United States Constitution by calling for jury service only individuals registered to vote in El Paso County. There is no rational basis for assuming that non-voters or residents of the state for less than one year would not be

adequate jurors in a court of law. The Jury Commissioner arbitrarily excluded qualified persons from the jury panel.

CONCLUSION

The Court is urged to grant this Petition for Writ of Certiorari based upon the following grounds: that a substantial federal question is presented in this Petition, i.e. whether the jury selection process employed by the State of Colorado in Petitioner's case was unconstitutional and violated his right to a fair and impartial jury by excluding prospective jurors who held scruples against imposing the death penalty; that since the death penalty is no longer considered by this Court to be a constitutional punishment for a crime, it logically follows that by excluding all persons who had scruples against the death penalty on the jury which sat in Petitioner's case the State of Colorado denied him the right to a fair and impartial jury; that the method of selection of the jury array was unconstitutional by excluding all non-voters.

Respectfully submitted,

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APPENDIX A

No. 25011

The PEOPLE of the State of Colorado,
Plaintiff-Appellee,
v.
Steven Lyle CRAIG,
Defendant-Appellant,

July 3, 1972
En Banc

Appeal from the District Court of the County of El Paso, Hon. G. Russell Miller, Judge, Judgment affirmed.

Duke W. Dunbar, Attorney General, John P. Moore, Deputy Attorney General, Richard G. McManus, Jr., Assistant Attorney General, for plaintiff-appellee, Peter H. Ney for defendant-appellant.

MR. JUSTICE HODGES delivered the opinion of the Court.

The defendant, Steven Lyle Craig, was convicted by a jury of first-degree murder and conspiracy to commit first-degree murder. He was sentenced to the state penitentiary for life. On appeal, he advances three contentions which he maintains require a reversal of his conviction. We do not find any of these contentions to be meritorious and we therefore affirm the judgment of the trial court. Inasmuch as defendant's arguments relate to legal and procedural matters, it is unnecessary to set forth the circumstances of this brutal homicide.

I.

The defendant first argues that it was error to refuse defendant's challenges for cause to certain jurors who had served on a prior jury within one year of service on defendant's jury. Three of the impanelled jurors and six other veniremen stated on voir dire that they had served on other juries the week prior to defendant's trial. In each case, the jury service was performed not at a prior term of court, but during the term of the defendant's trial.

C.R.S. 1963, 78-5-2 provides:

> "The fact that any person summoned in any way to serve as a juror in any court of record shall have served as a juror in any of said courts, at any prior term, within one year next preceding, shall be sufficient excuse for such person from service, and may also be ground for challenge for cause to such individual summoned." (Emphasis added.)

The plain meaning of this statute is that a juror who has served at a prior term of any court of record, which term was within one year prior to the trial in question, is excusable for cause on this ground. It does not mean that a juror who has served within one year of defendant's trial, but in the same term of court is excusable on this ground. The jurors in question here were not subject to a successful challenge on the basis of this statute. See Denver Tramway Co. V. Kennedy, 50 Colo. 418, 117 P. 167 (1911).

II.

The defendant next asserts that it was error to allow the district attorney to death

qualify the jury. Several recent pronouncements of this court hold that it is not error to exclude from the jury those persons who state that they would not be able to consider and impose the death penalty under any circumstances because of religious, ethical or moral scruples against the death penalty. See English v. People, ____ Colo. ____, ____P. 2d____, Supreme Court No. 24000, announced May 30, 1972; Carroll v. People, ____ Colo. ____, 494 P. 2d 80 (1972); Padilla v. People, 171 Colo. 521, 470 P. 2d 846 (1970); Hampton v. People, 171 Colo. 153, 465 P. 2d 394 (1970); Atencio v. People, 147 Colo. 566, 364 P. 2d 575 (1961). These cases are controlling authority here.

The defendant's other contention of error regarding the selection and composition of the jury panel is without merit.

III.

Finally, the defendant contends that the court erred in allowing the prosecution to present a co-conspirator's incompetent and prejudicial testimony over the defendant's objection. The objection made to this testimony at trial by defendant's counsel was that it was incompetent because the co-conspirator had not yet been sentenced on his guilty plea and that the district attorney was holding this over the head of the witness. On appeal, the defendant's objection to the testimony is that the district attorney was allowed to elicit from the witness the fact that he was presently incarcerated in jail on charges of first-degree murder and conspiracy to commit murder. Later in his direct testimony, the witness stated that he had pleaded guilty to the

conspiracy charge because "I'm guilty of it and I plead guilty to it."

On cross-examination, defense counsel interrogated the witness about the charges pending against him and the reasons for the delay in sentencing. It is true that where the prosecution puts a co-defendant or co-conspirator on the stand and directly and deliberately elicits from him answers concerning his guilty plea to charges arising out of the same event that defendant is charged with, such testimony may be prejudicial and inadmissible against the defendant. Leech v. People, 112 Colo. 120, 146 P.2d 346 (1944); Paine v. People, 106 Colo. 258, 103 P.2d 686 (1940). It is also true, however, that this testimony must be considered in light of the entire case in order to determine its prejudicial effect, if any. In our view, while the prosecutor should not have elicited testimony concerning the witness' guilty plea, the evidence of defendant's guilt was so overwhelming as to make the reference to the guilty plea harmless error in this case. Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969). This is especially true where defense counsel himself questioned the witness about this guilty plea in an effort to impeach his credibility.

Judgment affirmed.

Mr. Justice Erickson not participating.

APPENDIX B

Revised Statutes of the State of Colorado 1963:

40-2-3. Implied malice - degree of murder - plea of second degree murder permitted - when - penalty. -(1) Malice shall be implied when no considerable provocation appears, or when all circumstances of the killing show an abandoned and malignant heart. All murder which shall be perpetrated by means of poison or lying in wait, torture, or any kind of willful, deliberate and premeditated killing; or which is committed in the perpetration or attempt to perpetrate any arson, rape, robbery, mayhem, or burglary; or perpetrated from a deliberate, and premeditated design, unlawfully and maliciously, to effect the death of any human being other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others and indicating a depraved mind, regardless of human life, shall be deemed murder of the first degree, and all other kinds of murder shall be deemed murder of the second degree. The jury before which any person indicted for murder shall be tried, shall, if it find such person guilty thereof, designate by its verdict whether it be murder of the first or second degree, and if murder of the first degree, the jury shall in its verdict fix the penalty to be suffered by the person so convicted, either at imprisonment for life at hard labor in the penitentiary, or at death; and the court shall thereupon give sentence accordingly.